STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 19, 2022)

WAYMAN TURNER	:	
	:	
V.	:	**C.A. No. PM-2010-4329**
	:	
STATE OF RHODE ISLAND	:	

DECISION

I

Facts and Travel

CARNES, J. In the matters before the Court, Wayman Turner[1] (hereinafter Petitioner) was indicted along with several others for offenses related to the murder of Christopher Nelson. Indictment P1-2004-3981 DG. *See* Ex. 7 G. The indictment alleged that Petitioner and other named individuals committed the offenses on or about August 16, 2004 in the City of Providence, Rhode Island.[2] The indictment contained six counts. Petitioner was arraigned on January 5, 2005 on the six counts. *See* Ex. 3 C, Transcript of January 5, 2005 arraignment. The charges included: Count 1, murder of Christopher Nelson; Count 2, assault with intent to rob Christopher Nelson; Count 3, conspiracy to rob Christopher Nelson; Count 4, discharge of a firearm causing the death of Christopher Nelson; and Count 6, possession of a firearm by Petitioner after having been

[1] The indictment refers to Petitioner as Wayman Kevin Turner.

[2] The uncontroverted facts indicated that Petitioner accompanied others to the victim's residence on Knight Street in Providence where an attempted robbery ended in a murder.

previously convicted of a crime of violence.[3] Petitioner was also given a Habitual Offender Notice that day (Ex. 3 C at 2:4) and additionally presented as a violator of several previous sentences pursuant to Rule 32(f) of the Superior Court Rules of Criminal Procedure. *See* Ex. 17 Q and Ex. 3 C at 2:12-25. Gerard Donley was appointed to represent Petitioner that day as previous counsel, the public defender, had withdrawn due to a conflict. *See* Ex. 3 C at 2:16-18.

A. Subsequent Plea Negotiation, Open Ended Plea, and Sentencing

It is uncontroverted that the State planned to proceed on a felony-murder theory against Petitioner. *See* Ex. 4 D at 3:7-17. Petitioner's potential exposure at a trial on the five applicable counts of the indictment[4] would be consecutive life sentences based upon Count 4 of the indictment charging Petitioner with discharge of a firearm while committing a crime of violence, to wit, a robbery, causing the death of Christopher Nelson. *See* Ex. 7 G, Count 4. The consecutive life sentences might include even more time to serve based on an adjudication of the Habitual Offender Notice and the sentences imposed on Counts 2, 3, and 6 of the indictment.

It is further uncontroverted that after plea negotiations, Petitioner entered pleas of guilty on April 24, 2006 before another Justice of the Superior Court to an amended Count 1 charging murder of Christopher Nelson in the second degree. *See* Ex. 4 D at 2:4-14. Pursuant to the terms of said negotiated plea deal, the sentence would be decided by that court at a later date following a presentence report. For Count 1 as amended, the range was to be "not less than 10 years nor more than life in prison." For Count 3, the sentence would be "[n]o more than 10 years in prison, concurrent with count 1." *See* Ex. 22 V and Ex. 4 D at 2:15-3:6.

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[3] Count 5 only relates to another codefendant and does not relate to Petitioner. Count 6 only relates to Petitioner. The first four Counts specifically name Petitioner and three other codefendants in each count.

[4] Count 5 of the indictment did not relate to Petitioner. Only Counts 1, 2, 3, 4, and 6 related to Petitioner. *See* footnote 3, *supra*.

Petitioner was thereafter sentenced after a full hearing on June 29, 2006. He received a life sentence on Count 1 and ten years to serve on Count 3, to be served concurrently. *See* Ex. 5 E at 24:4-8.

B. Application for Postconviction Relief and Hearing

Given that Petitioner's right to appeal his sentence was foreclosed by his plea agreement, (Ex. 22 V, ¶ 7), Petitioner filed an application for postconviction relief (Ex. 19 S). Counsel was appointed and eventually an evidentiary hearing occurred on May 26, 2022 and June 15, 2022 via Webex technology as the Petitioner was incarcerated at North Central Correctional Institution located in Gardner, Massachusetts. Petitioner willingly agreed to proceed to the Webex hearing and, once the hearing concluded, the Court would receive post-hearing memoranda and thereafter render a written decision. *See* Transcript[5] of evidentiary hearing 5-7, May 26, 2022 and June 15, 2022 (Tr.).

A number of exhibits were introduced as joint exhibits for the hearing (Exhibits 1 A through 24 X). All are full exhibits. The Court also introduced a court exhibit comprising the actual presentence report. The record mistakenly indicates the exhibit was to be sealed and scanned into the electronic file. The exhibit, while sealed, (*see* Order dated June 15, 2022), was not scanned into the Court file due to its confidential[6] nature. It was sealed and is kept in the vault for the Newport County Superior Court pending further order of the court or transmission to the Rhode Island Supreme Court for further review. *Id.*

[5] The transcript for both hearing dates is combined and the pages numbered sequentially over both days.
[6] *See State v. Cianci*, 485 A.2d 565 (R.I. 1984).

C. Petitioner's Specific Claims

Per his initial handwritten application for postconviction relief (Ex. 19 S),[7] Petitioner states that his 5th, 6th, and 14th amendment rights have been "seriously infringed" and seeks to set aside his conviction based upon his claim that he was "incompetent" and received "ineffective assistance of counsel, who failed to conduct a reasonable investigation into and move/request [an] immediate [psychological] evaluation of petitioner's incompetency and by coercion thereof, rendered his plea of guilty to 2nd murder, invalid and void ab initio." Ex. 19 S at 1-2. In his application, Petitioner goes on to describe an "[illusory] promise" made to him by counsel, wherein counsel told him he would receive a sentence of twenty years.[8] *Id*. at 3. In his application, Petitioner goes on to state "[a]lthough it is indisputable that petitioner did in fact sign a plea agreement admitting guilt," he thereafter maintains, "why would any reasonabl[y] competent attorney allow his client, who is assumed to be incompetent and innocent, plea [*sic*] guilty." *Id*. at 4. In his post-hearing memorandum, Petitioner notes that while defense counsel makes reference to Petitioner's psychiatric background (referring to Ex. 5 E at 12), he did not seek a mitigation expert to work it up as prior defense counsel had planned. *See* Closing Argument Memorandum in Support of Petition for Post-Conviction Relief (hereinafter simply "Petitioner's Mem.") at 3-4. In rejoinder, the State suggests that it is unlikely that defense counsel promoted a false confidence in Petitioner's likelihood of receiving a less than life sentence. *See* State's Post-Hr'g Mem. at 9. The State also suggests that Petitioner has not satisfied the prejudice prong in support of his claim of

[7] Exhibit 19 S moves the Court for "an *amended* application for post-conviction relief . . ." (emphasis added); however, the original application is not apparent in the record, evidence, or within the original file.

[8] The claim of a promise of a twenty-year sentence has changed over the course of the evidentiary hearings on Webex as depicted and discussed herein.

postconviction relief. *Id*. at 10-11. Further reference will be made to the testimony, evidence, and arguments herein.

II

Standards of Review

A. Postconviction Relief

"'[P]ost[ ]conviction relief is available to a defendant convicted of a crime who contends that his original conviction or sentence violated rights that the state or federal constitutions secured to him.'" *Lipscomb v. State*, 144 A.3d 299, 306-07 (R.I. 2016) (quoting *Bell v. State*, 71 A.3d 458, 460 (R.I. 2013)). General Laws 1956 §§ 10-9.1-1 to 10-9.1-9 govern the statutory remedy of postconviction relief, which is available to any person who has been convicted of a crime in this state and who thereafter alleges either that the conviction was in violation of the constitution of the United States or the constitution or laws of this state. "[A]n application for postconviction relief is civil in nature," and the applicant has the burden of proving that "relief is warranted" by a preponderance of the evidence. *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988); *Mattatall v. State*, 947 A.2d 896, 901 n.7 (R.I. 2008).

B. Ineffective Assistance of Counsel

Any analysis of a claim of ineffective assistance of counsel begins with the case of *Strickland v. Washington*, 466 U.S. 668 (1984), which has been adopted by the Rhode Island Supreme Court. *See LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996) and *Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987). Whether an attorney has failed to provide effective assistance is a factual question which a petitioner bears the "heavy burden" of proving. *Rice v. State*, 38 A.3d 9, 17 (R.I. 2012); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (noting that *Strickland* presents a "high bar" to surmount).

When reviewing a claim of ineffective assistance of counsel, the question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Heath v. Vose*, 747 A.2d 475, 478 (R.I. 2000). A *Strickland* claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *Powers v. State*, 734 A.2d 508, 522 (R.I. 1999).

The Sixth Amendment standard for effective assistance of counsel, however, is '"very forgiving,"' *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (quoting *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000)), and "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. *Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995) ("[A] defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy."); *Bell*, 71 A.3d at 461 ("[A]pplicants seeking postconviction relief due to ineffective assistance of counsel are saddled with a heavy burden, in that there exists a strong presumption [recognized by this Court] that an attorney's performance falls within the range of reasonable professional assistance and sound strategy . . . ." (quoting *Rice*, 38 A.3d at 17 and *Ouimette v. State*, 785 A.2d 1132, 1138-39 (R.I. 2001)) (internal quotation marks omitted).

Even if the Petitioner can satisfy the first part of the *Strickland* test, he must still overcome a second hurdle by demonstrating that his attorney's deficient performance was prejudicial. By that measure, he is required to show that a reasonable probability exists that but for counsel's

unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009).

The United States Supreme Court has held that the *Strickland* test for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges based on ineffective assistance of counsel, *Hill v. Lockhart*, 474 U.S. 52 (1985). In 2011, the Rhode Island Supreme Court adopted the standard set out in *Hill* in the case of *Neufville v. State*, 13 A.3d 607 (R.I. 2011). While it was unnecessary to analyze the prejudice prong in *Neufville*, the R.I. Supreme Court did state:

> "We pause to note, however, that in the context of a negotiated plea, to prevail on an allegation of ineffective assistance of counsel, the defendant must show that he would have insisted on going to trial and that the outcome of that trial would have been different. *See Hill*, 474 U.S. at 59, 106 S.Ct. 366; *Figueroa*, 639 A.2d at 500. We have held that when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the defendant has an almost insurmountable burden to establish prejudice. *Rodrigues*, 985 A.2d at 317. *See Gonder v. State*, 935 A.2d 82, 88 (R.I. 2007); *Hassett v. State*, 899 A.2d 430, 437 (R.I. 2006)." *Neufville*, 13 A.3d at 614.

C. Rule 11 of the Superior Court Rules of Criminal Procedure

While Petitioner has not mentioned or discussed Rule 11 of the Superior Court Rules of Criminal Procedure, in light of the evidence, testimony, and arguments set forth, and especially in light of Petitioner's specific claim that his "5th, 6th, and 14th amendment rights have been seriously infringed" (Part I C herein and Ex. 19 S at 1, *et seq*.), Rule 11 is worth a mention here.

In pertinent part, Rule 11 states:

> "The court … shall not accept such plea [of guilty] . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . ."

While Rule 11 serves as a safety net "to *ensure that there is compliance with constitutional requirements*," it is not intended to "serve as a trap for those justices who fail to enumerate each fact relied on to accept such a plea." *See Camacho v. State*, 58 A.3d 182, 186 (R.I. 2013); *State v.*

Frazar, 822 A.2d 931, 936 (R.I. 2003) (emphasis added). In addition, if a petitioner claims that Rule 11 was not satisfied, he must "bear the burden of proving by a preponderance of the evidence that [he] did not intelligently and understandingly waive [his] rights." *State v. Figueroa,* 639 A.2d 495, 498 (R.I. 1994).

III

Analysis

A. Petitioner Is Not Incompetent

Notwithstanding his initial claim in his application for postconviction relief (Part I C, *supra*, and Ex. 19 S), Petitioner has not demonstrated that he is or was incompetent. The Petitioner is and was statutorily presumed to be competent. *See* G.L. 1956 § 40.1-5.3-3(b) ("(b) Presumption of competency. A defendant is presumed competent. The burden of proving that the defendant is not competent shall be by a preponderance of the evidence, and the burden of going forward with the evidence shall be on the party raising the issue. The burden of going forward shall be on the state if the court raises the issue.") *See also* § 40.1-5.3-3(a)(5) in the definitions section: ("(5) 'Incompetent' or 'incompetency' means mentally incompetent to stand trial. A person is mentally incompetent to stand trial if [he or she] is unable to understand the character and consequences of the proceedings against him or her or is unable properly to assist in [his or her] defense.")

The Rhode Island Supreme Court has held that in order for a court to permit an accused to be subject to a criminal prosecution, "three things must be found: first, that defendant understands the nature of the charges brought against him; second, that defendant appreciates the purpose and object of the trial proceedings based thereon; and third, that defendant has the mental capacity to assist reasonably and rationally his counsel in preparing and putting forth a defense to the criminal

charges of which he stands accused." *See State v. Cook*, 104 R.I. 442, 447, 244 A.2d 833, 835 (1968). *See also State v. Buxton*, 643 A.2d 172, 175–76 (R.I. 1994).

When initially arrested, Petitioner gave a statement to the police admitting to his part in a robbery plan to rob certain individuals at a particular house in Providence. During the course of that event, Christopher Nelson allegedly grabbed the gun that was in Petitioner's hand and allegedly caused it to fire and kill Mr. Nelson. *See* Ex. 15 O, Petitioner's statement to police. That statement, along with the totality of his testimony over two days in the evidentiary hearing, as well as the notes of prior defense counsel, Mary McElroy, Exhibits 8 H, 11 K, 12 L, 13 M, 14 N, and 16 P make it clear beyond any peradventure that Petitioner understood the nature of the charges brought against him and also appreciated the purpose and object of the trial proceedings based thereon. At one point, while at the intake section of the prison, Petitioner initiated a conversation with prison authorities in an effort to assist himself. (*See* Tr. 97.) Lastly, it is clearly apparent from his own testimony and the above-described exhibits that Petitioner possessed the mental capacity to assist reasonably and rationally his counsel in preparing and putting forth a defense to the criminal charges of which he stood accused. Notwithstanding petitioner's sworn testimony that his counsel should have known he was incompetent, (Tr. 11) and Exhibit 19 S, the Court finds that Petitioner has not demonstrated that he was incompetent.

B. Petitioner's Claim He Was Promised a Term of Years to Serve in Lieu of a Life Sentence

Petitioner's claim that he was promised a term of years to serve in return for his guilty plea to an amended charge of second degree murder (Count 1 amended) and a conspiracy to rob charge (Count 3) in lieu of a life sentence trends apocryphal in light of a number of factors on the record.

First, the exact term to serve could be either twenty or twenty-five years depending on the testimony. Compare Petitioner's "amended" application for postconviction relief, Ex. 19 S at 3

and testimony at the evidentiary hearing on May 26, 2022 (Tr. 16) (speaking to a promise for a twenty year sentence) with his testimony on June 15, 2022 wherein Petitioner testified he was supposed to be sentenced to twenty-five years. (Tr. 84.) Next, only the State, through the Attorney General, had the authority to offer any amendment or binding agreement. *See State v. Russell*, 671 A.2d 1222 (R.I. 1996) and *State v. Rollins*, 116 R.I. 528, 533, 359 A.2d 315, 318 (1976) ("It is well settled . . . that the Attorney General is the only state official vested with prosecutorial discretion."). While Petitioner has testified he initiated conversations for free talks with prison officials (Tr. 78-84), it is clear from the testimony of both defense counsel, and from the sentencing transcript, (Ex. 5 E, especially 5-13) that the Attorney General never recommended less than life despite agreeing to amend the murder charge to a second-degree murder.

Moving on, even a cursory examination of the initial plea colloquy on April 24, 2006 (Ex. 4 D) seriously undercuts Petitioner's claim on this issue. Both the Plea form (Ex. 22 V) as well as the April 24, 2006 transcript (Ex 4 D) are full exhibits. Petitioner was sworn under oath on April 24, 2006. (Ex. 4 D at 1:14-15.) The hearing justice indicated he understood that the State would amend the murder charge to second degree murder. *Id*. at 1:22–2:7. The amendment was accepted by the Petitioner. *Id*. at 2:12-14. The Court went on to state that "[i]f the defendant offers a guilty plea to that charge and Count 3 [of the indictment charging conspiracy to rob], the State is agreeable and the defendant understands that at the time of sentencing he would be subjected to as much as a life sentence on Count 1 and as much as ten years to serve on Count 3. *Id*. at 2:15-20. Additionally, the Court went on stating "[a]t the same time the defendant would be free to argue for a sentence of less than life to serve on Count 1. In any event, it certainly would be no less than ten years by statute. He will be free at the time of the sentencing hearing to request a sentence other than life; is that correct Mr. Donley?" *Id*. at 2:22-3:3. Both the State and defense counsel,

Mr. Donley, indicated the previous statement of the Court's understanding was correct. *Id*. at 3: 4-6.

The Court next discussed that it understood the State was proceeding upon a felony murder theory, *id*. at 3:7-10, and the State agreed that it was proceeding on a felony murder theory and detailed the specifics wherein Christopher Nelson was shot and killed in the course of a robbery. *Id*. at 3:11-17. The Court immediately inquired of defense attorney Donley if he had explained to Petitioner the "import" of felony murder as well as vicarious liability law and conspiracy statutes. *Id*. at 3:18-22, and Attorney Donley replied, "I have on a number of occasions in great detail." *Id*. at 3:23-24. Four days after the incident, Petitioner was arrested and gave a statement to the Providence police. *See* Ex. 15 O. After waiving his rights, *id*. at 3-5, he stated that someone[9] approached him for "the opportunity to make some money." *Id*. at 5. Petitioner explained that he went there "to get the money," *id*, and "[t]he guy opened the door, we started wrestling with the gun. I pulled the gun away from him and it went off, then I just left." *Id*. The theory of felony murder is that a defendant does not have to have intended to kill one who dies during the course of certain statutorily enumerated felonies. *Torres v. State*, 19 A.3d 71 (R.I. 2011). The penalty on conviction for felony murder is life in prison. *See* G.L. 1956 § 11-23-2, Penalties for murder.

> "Every person guilty of murder in the first degree shall be imprisoned for life. Every person guilty of murder in the first degree: (1) committed intentionally while engaged in the commission of another capital offense or other felony for which life imprisonment may be imposed; (2) committed in a manner creating a great risk of death to more than one person by means of a weapon or device or substance which would normally be hazardous to the life of more than one person; (3) committed at the direction of another person in return for money or any other thing of monetary value from that person; . . . shall be imprisoned for life. . . ." Sec. 11-23-2.

[9] Initially, Petitioner refused to identify the individual(s) he acted with on August 16, 2004 and before, allegedly due to fear for his life. *See* Ex. 15 O.

Notwithstanding any intoxication or mental health mitigation, or other mitigation, (*see e.g.* Exhibits 8 H, 11 K, 12 L, 13 M and 14 N), the penalty for felony murder is a mandatory life sentence. It is undisputed that the Petitioner agreed with defense attorney Donley's statement that Donley had "fully explained" "the import of felony murder" along with vicarious liability law and conspiracy statutes. Ex. 4 D at 3:18-4:2. Petitioner next answered a number of questions of the hearing justice indicating he signed the plea form (Ex. 22 V) and he went over it carefully with his attorney before signing it. Ex. 4 D at 3:25-4:2. He stated that he was thirty-seven years old at the time, had obtained his GED, that he could read and write English, and did not have any drugs, alcohol, or medication in the last twenty-four hours. *Id*. at 4:3-23. Petitioner further indicated that he was satisfied with his lawyer's assistance on his behalf. *Id*. at 4:24–5:1. The hearing justice specifically asked, "Do you understand if I thought it was appropriate I could very well put you in jail for as much as life to serve on this case at the time of sentencing." *Id*. at 5:2-5. Petitioner answered, "Yes." *Id*. at 5:6. The hearing justice went on to ask, "Anybody promise that I would not do that?" *Id*. at 5:7-8. The Petitioner responded, "No, sir." *Id*. at 5:9. Later in the plea colloquy, after hearing the factual basis that the State would have intended to prove at trial and acknowledging what the prosecutor stated, (*id*. at 6:2-9:1), the hearing justice then specifically explained:

> "You have a right to a trial on these charges. You would have been presumed innocent, you would not have had to testify or present evidence. The State would have been required to prove your guilt beyond a reasonable doubt. You would have the right to confront and cross-examine the State's witnesses. If I accept your guilty plea, these charges and all of your trial rights are waived, they disappear, so do any appellate rights you might otherwise have had if you had been convicted are also waived and they disappear. Do you understand all of that?" *Id*. at 9:2-13.

Petitioner answered, "Yes, your Honor." Id. at 9:14.

Notwithstanding the undisputed text of the plea colloquy, Petitioner testified at an evidentiary hearing that he told the hearing justice that he wanted to go to trial but defense attorney Donley later came to him and told him the State made a deal for twenty years and the hearing justice would go along with it. (Tr. 27:1-24.) The record before this Court is completely bereft of any transcript where Petitioner tells the hearing justice he wants to go to trial. Continuing with the colloquy, the hearing justice explains that if he accepts Petitioner's plea, then Petitioner would not be allowed to withdraw it later on without the Court's permission. Petitioner acknowledges the same. Ex. 4 D at 9:15-18. Significantly, the hearing justice next asked, "Has anybody forced or coerced you to plead guilty to these charges?" Petitioner responded, "No, your Honor." The hearing justice went on with the query, "Are you pleading guilty to [these charges] because in fact you did commit them?" Again Petitioner responded, "Yes, your Honor." *Id*. at 9:19-24. The hearing justice next goes on to make a finding that he is satisfied that there is a factual basis for the plea and that "the [Petitioner] fully understands the rights he is giving up, has full awareness of the consequences, and [that Petitioner's] pleas [were] knowingly and voluntarily made." *Id*. at 9:25-10:6.

During his testimony at the evidentiary hearing, Petitioner testified that defense attorney Donley told him not to "make waves" before the hearing justice and further explained that this meant to him, "Don't mess up the deal that [Donley] had set in place." That was why he said "no" when asked if there was anything promised to him. (Tr. 115:8-25.) Part of the evidence before this Court is defense attorney Donley's deposition. Ex. 1 A. There is no reference to the expression "making waves" in any part of Ex. 1 A. Throughout much of the deposition, Donley testified he did not recall specifics but testified to his regular practices. Defense attorney Donley testified about his practice in "plea preparation" extensively and initially stated, "I was very proud

of how detailed I was. . . ." Ex. 1 A at 66:23-67:18. When asked about discussing any defenses with Petitioner in the case, Donley stated, "I don't recall the specific content of the conversations." *Id*. at 67:21-22. He then went on to explain the nature of discussions he would have had. *See id*. at 67:14-69:14. At one point defense attorney Donley was asked:

> "Q. Did you engender in the defendant a false confidence in the opportunity to get less than life in order to secure the plea from the defendant?" *Id*. at 73:18-21.

He responded:

> "A. I can't imagine that I would do that, no. I don't recall. I don't have any memory of that. I'm sure that if we did it, I probably--I certainly wouldn't have done it had there not been some hope that it would be of some value. Sometimes the defendants would not--you know, hope is a--in some people hope is very persistent, and so regardless of whether or not you are able to represent what something is likely to happen, the defendant says, well, what's--you know, what I tell them this or what --I mean I can't tell him what the outcome is going to be so I certainly didn't--*I'm sure I didn't lead any defendant, including Mr. Turner, to believe that entering into a life plea was going to likely lead to anything less than that*." *Id*. at 73:22-74:15 (emphasis added).

Given the entire context of the deposition, this response appears, to this Court, a bit more potent than a simple, "I can't recall but my usual practice is . . ." type of response.

Considering defense attorney Donley's deposition testimony, Petitioner's record testimony and exhibits, and the plea colloquy set forth in Ex. 4 D, this Court gives Ex. 4 D considerable weight. As the Rhode Island Supreme Court has previously stated, "The transcript from the plea proceeding is instructive." *Rodrigues v. State*, 985 A.2d 311, 314 (R.I. 2009). Under Rule 11 of the Superior Court Rules of Criminal Procedure, the hearing justice was prohibited from accepting Petitioner's plea without first addressing the Petitioner personally and determining that the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. Exhibit 4 D amply demonstrates that Petitioner admitted he committed the offenses and understood the parameters of the capped plea whereby he might receive as much as a full life

term while being free to argue for a term of less than life at a future sentencing hearing. The hearing justice specifically asked Petitioner if he understood that the hearing justice could sentence Petitioner to life, and when Petitioner answered yes, the hearing justice then immediately inquired if anyone had promised him that the hearing justice "would not do that," Petitioner answered, "No, sir." Ex. 4 D at 5:7-9. The Petitioner was under oath at the time. Petitioner's later testimony that he went along with everything so as not to "make waves" carries little weight in the face of his inconsistent testimony at a previous solemn plea hearing. This Court finds that Petitioner has not sustained his burden of proof in light of all the evidence on this issue.

C. Petitioner's Defense Attorney Was Not Substandard in Arguing Mitigation

Petitioner acknowledges that any diminished capacity argument under the felony-murder rule would be "unavailing." (Petitioner's Mem. 8.) However, the first-degree murder charge was amended by the State to second degree murder. Second degree murder is punishable by a term of not less than ten years but up to life in prison. *See* § 11-23-2. At this point, Petitioner argues that defense attorney Donley made no efforts to mitigate. While there was no specific mitigation report or sentencing memo prepared by Attorney Donley, the sentencing justice had a presentence report before him at the time of sentencing. *See* Ex. 5 E at 1:20. The sentencing justice stated that the presentence report had been shared with counsel and next inquired if there were any "amendments, supplements, or corrections in connection with the presentence report." Both the State's attorney and defense attorney Donley answered that there were not. *Id*. at 1:21-2:1. The sentencing justice next inquired if there were any materials he might not be aware of for him to review before going forward. Again, both attorneys responded in the negative. *Id*. at 2:2-5. The sentencing justice

also indicated he had received a number of letters "from"[10] the Petitioner. The presentence report, (sealed as a Court Exhibit), contains a statement of the Petitioner. *Id*. at 1:16-20.

The presentence report specifically states: "[I] *never had any intentions of hurting anyone . . . I did not intend to take his life*. I am not a bad person. I have made bad choices." Presentence Report 3 (emphasis added). The presentence report further contains a section on Family and Personal History. *Id*. at 3–6. Without repeating the entirety of the writing here, it is important to note and incorporate several pieces of information that are contained in the report into this Court's Decision. Petitioner indicated his father was a heavy drinker and he had no relationship with him. *Id*. at 3. He indicated that when he was four years old his mother moved him to Providence where he lived as the primary caretaker for all five siblings. They are identified and described along with some of their characteristics or troubles. Petitioner indicated that his mother told him that both she and her sister were molested by their father. The report goes on to indicate that Petitioner's grandmother "was and is a well-known Madam and drug dealer who involved her children in her prostitution business to support her drug addiction." *Id*. at 4. The presentence report indicates the family did not live with the grandmother, it does indicate that Petitioner's mother prostituted and sold drugs to support her and her mother's addiction. *Id*. The report goes on to indicate that when Petitioner was nine years old, his mother went to prison in New York for eight years on charges of assault with a deadly weapon and robbery. *Id*. Petitioner was sent to live with a maternal grandfather where he received constant verbal abuse and he only spoke to his mother one time during her eight years in prison. *Id*. The history continues detailing criminal activity of the Petitioner resulting in incarceration at the Rhode Island Training School for eighteen months. *Id*.

[10] While it is unclear whether such letters were written by the Petitioner or on behalf of Petitioner by others, the presentence report appears to indicate that at least two individuals planned to write letters on behalf of Petitioner.

at 5. After his release, the report indicates that Petitioner went back to Maryland and became a drug dealer. *Id*. at 5. The report further indicates that Petitioner "feels that he has some mental health issues that are unresolved." The presentence report further indicates that in 2001, Petitioner admitted himself to Butler Hospital for abusing cocaine but feels that his "issues go beyond his substance abuse issues." *Id*. at 4-5. The record in the instant case contains Exhibit 6 F entitled "Psychological Assessment." It contains four paragraphs over two pages and is signed by Karen Brennan, MSW, LCSW.[11] The exhibit details a great deal of the information contained about Petitioner that appears in the presentence report. The exhibit has what appears to be a fax date at the top left of January 31, 2002 and further indicates the fax was received by the public defender at the top center of the document. The exhibit itself, in its first sentence, states Petitioner is thirty-three years old. Given Petitioner's birthdate in 1968, this would appear to date the writing sometime in 2001. This appears to be the document referred to by the presentence report. What does not appear in the presentence report is Ex. 6 F's third paragraph, which contains the statement "[Petitioner] was hospitalized at Butler Hospital for suicidal ideations[12] with a plan. He spent three days in Butler Hospital and was discharged due to lack of insurance." Ex. 6 F ¶ 3. Ex. 6 F goes on to state that Petitioner was "referred to residential treatment, but relapsed while on waiting lists." *Id*. The exhibit goes on to state, "Based on his history of trauma and abuse [Petitioner] could benefit from long term residential treatment, where his emotional disabilities around trauma and

[11] MSW depicts the holder of such a degree has a Master of Social Work. LCSW depicts the holder is a Licensed Clinical Social Worker. *See* Rhode Island Social Work Licensing Requirements, https://www.socialworkguide.org/licensure/rhode-island/#:~:text=Master%20of%20Social%20Work%20(MSW)&text=To%20become%20licensed%20as%20a,from%20a%20CSWE%2Daccredited%20program (last visited October 12, 2022).

[12] While the reference to suicidal ideations was not in the presentence report, it was specifically referenced before the sentencing justice in Defense attorney Donley's argument. *See* Ex. 5 E at 18:7-8 and further discussed in this section, *infra*.

abuse can be addressed." *Id*. ¶ 4. The report concludes with two lines on page two stating, "[Petitioner] understands his triggers for relapse, which is a significant factor to recovery." *Id*. at 2.

Going back to the presentence report, the document continues noting that the writer had spoken to Petitioner's mother and also a sibling and that both were planning on "send[ing] letters of support to the Court." Presentence report at 6. A substance abuse counselor who knew Petitioner had given a phone interview to the writer indicating Petitioner was not a "bad guy" but someone whose drug addiction caused him to make bad decisions. *Id*. Overall, the presentence report provides a great deal of information as to family and personal history. This Court accords it significant weight.

Defense attorney Donley's argument spans some seven pages of Exhibit 5 E (compared to the State's nine pages). Ex. 5 E at 13-19. While the words speak for themselves, a number of comments and arguments are worth noting here. Donley initially tells the sentencing justice, "Your Honor, I know that the Court has read all of the materials submitted, including the biography of [Petitioner] which was made a part of the presentence report." *Id*. at 13:15-18. After commenting on the suffering that the victim's family would endure in a sympathetic and compassionate way, he returns to the presentence report and comments upon the contrast in backgrounds between the victim and Petitioner. *Id*. at 14:3-14. Defense attorney Donley specifically mentions the Psychological Assessment (Ex. 6 F) and its comments relative to Petitioner's family and background. *Id*. at 14:13-15:5. Defense attorney Donley next suggests that any sentence should be sculpted to "address the individual defendant," acknowledging that "[n]o one will ever diminish the intense tragedy that was forced upon the Nelson family." *Id*. at 15:6-15. He goes on to acknowledge another robbery in Petitioner's past along with a conviction

for larceny from the person, attempting to distinguish the latter from an actual robbery conviction. *Id*. at 15:16-16:5.

Defense attorney Donley next goes on to speak about the relative culpability of those individuals involved in the crime, suggesting that Petitioner was "recruited" and "[did not] do the recruiting." *Id*. at 16:6-10. He argues to the sentencing justice that Petitioner "is not the person who obtained the gun, all of the parties did." *Id*. at 16:13-15. The argument continues noting that all involved smoked marijuana at Petitioner's house before they left to rob Mr. Nelson's roommate. He argues, "It was because the gun was at his house when the event unfolded that [Petitioner] carried the gun." *Id*. at 16:15-22. The next specific lines of argument are noteworthy enough to set forth exactly here:

> "There is no question about any of the facts, and [Petitioner]is *not here to diminish his criminal acts that day*. He *never expected Mr. Nelson to be there, he never expected Mr. Nelson to grab the gun, and he never expected the gun to go off. The accusations or representations that [Petitioner] decided to pull the trigger is simply and clearly wrong. He never decided to pull the trigger. The gun went off while the two were struggling. That is undisputed*. He is responsible for Mr. Nelson's death. He is guilty of murder, but *he did not intend to kill Mr. Nelson*. Ex. 5 E at 16:23-17:8. (Emphasis added.)

Defense attorney Donley, as the above passage illustrates, combines an acknowledgement of guilt while presenting mitigating circumstances. This Court compares the evidence and especially the specific information articulated in this section of the Court's Decision with Petitioner's testimony at the evidentiary hearing:

> "[A]nd how the whole case – you know, how the case unfurled. You know what I'm saying? I wanted all that to come out. Like it just wasn't no stick them up, shoot somebody, and leave. You know what I'm saying? I wanted all of that to come out. . . .[The sentencing justice] didn't even know the facts of the case when I went in front of him. He read from a file, and I had been locked up for two years already . . ." Tr. at 101:14-24.

This Court finds that the information Petitioner has testified about and wanted to come out was, in fact, brought out at the sentencing hearing as set forth in Exhibit 5 E. To suggest that such mitigating information was not brought out is not credible.

Defense attorney Donley's sentencing argument continues noting that Petitioner "has from day one admitted his culpability" and expressed "grief, sorrow, and remorse." Ex. 5 E at 17:17-22. Donley further states, "[Petitioner] has done everything since that moment to try to make some amends in his limited capacity at the prison . . . [including making] efforts to try to assist in other matters." *Id*. at 17:22-25. Defense attorney Donley next recounts that Petitioner had been attacked in prison and was blind in one eye at that time. *Id*. at 18:1-4. He continues arguing to the sentencing justice that Petitioner was not a "vicious criminal" or a "vicious or heinous uncivilized person." He references the 2002 Psychological Assessment telling the sentencing justice, "In 2002 [Petitioner] was so depressed he was suicidal. The documents submitted to the Court show that he admitted himself into Butler Hospital."[13] *Id*. at 18:5-10. Donley goes on to articulate and reference Petitioner's struggles, reminding the sentencing justice about Petitioner's family and children and his ability to see them again, suggesting a sentence of a term of years as a sentence "with about 30[14] years to serve." *Id*. at 18:10-18. He argues that "[Petitioner] is not looking for immediate forgiveness without punishment." *Id*. at 18:18-19. Donley finishes by pointing out the

[13] This Court finds this is clearly a reference to Exhibit 6 F in the instant proceeding.

[14] This Court finds the suggestion of a term of years with thirty years to serve interesting in light of Petitioner's inconsistent testimony about expecting a term of either twenty-five or twenty years. (discussed *supra*). This Court wonders, albeit rhetorically, as to why defense attorney Donley would suggest thirty years to serve if he had spoken to Petitioner about a twenty- or twenty-five-year term.

other sentences imposed on the other participants[15] suggesting a punishment that is "appropriate and proportionate to . . . [that of] the other defendants." *Id*. at 18:20-19:15.

The text of Exhibit 5 E next depicts that Petitioner addressed the Court, apologized, indicated that he did not go [to perpetrate the crime] to hurt anyone, and asked for forgiveness. *Id*. at 19:20-20:9. Petitioner stated that he "wrote something" but wanted to "speak from [his] heart and [his] head. *Id*. Petitioner stated that he was "rehabilitatable" [*sic*] and had children. *Id*. Petitioner's comments at sentencing appeared well organized and appropriate. The comments spanned approximately two and one-half pages of transcript.

Considering the totality of the evidence with all testimony and exhibits, this Court finds that defense attorney Donley's sentencing argument was well organized, informative, eloquent at times, and appropriate, and given the forgiving standards under *Strickland*, and the cases adopting *Strickland* in this jurisdiction, well within the bounds of competent defense representation. Notwithstanding the arguments in Petitioner's Mem., this Court declines to find defense attorney Donley substandard in arguing mitigation.

D. Petitioner Has Not Demonstrated That He was Prejudiced.

While given this Court's findings thus far, it would be unnecessary to address the prejudice prong of Petitioner's postconviction-relief application, the Court will address the prejudice prong anyway for the sake of completeness. As indicated earlier herein, the United States Supreme Court has held that the *Strickland* test for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges based on ineffective assistance of counsel. *Hill*, 474 U.S. 52. In 2011, the Rhode Island Supreme Court adopted the standard set out in *Hill* in the case of *Neufville*, 13 A.3d

[15] One of those participants was at large at the time of sentencing but has since been apprehended, tried, and sentenced

607. While it was unnecessary to analyze the prejudice prong in *Neufville*, the R.I. Supreme Court did state:

> "We pause to note, however, that in the context of a negotiated plea, to prevail on an allegation of ineffective assistance of counsel, the *defendant must show that he would have insisted on going to trial and that the outcome of that trial would have been different*. *See Hill*, 474 U.S. at 59, 106 S.Ct. 366; *Figueroa*, 639 A.2d at 500. *We have held that when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the defendant has an almost insurmountable burden to establish prejudice*. *Rodrigues*, 985 A.2d at 317. *See Gonder v. State*, 935 A.2d 82, 88 (R.I. 2007); *Hassett v. State*, 899 A.2d 430, 437 (R.I. 2006)." *Neufville*, 13 A.3d at 614. (Emphasis added.)

In the instant case, as discussed *supra*, Petitioner was charged with five charges contained in a six-count indictment.[16] (Ex. 7 G.) Count 1 was a murder charge and, as described herein, the State of Rhode Island was proceeding under a felony-murder theory. This exposed Petitioner to a mandatory life sentence. Count 4 charged Petitioner with discharge of a firearm while committing a crime of violence, to wit, robbery, causing the death of Christopher Nelson under G.L. 1956 § 11-47-3.2(b)(3). This exposed Petitioner to a potential *mandatory consecutive life sentence*. *See* § 11-47-3.2(b)[17] (emphasis added). Furthermore, Petitioner was presented as a "Habitual Offender," *see* G.L. 1956 § 12-19-21 entitled "Habitual criminals." If found to be a habitual offender or habitual criminal, Petitioner was exposed to a potential twenty-five-year consecutive sentence after the consecutive life sentences described here and with a portion of the habitual offender sentence to be without parole.

In the instant case, once the State agreed to amend the murder charge in Count 1 to second degree murder, the potential sentence was no longer a mandatory life sentence. Second degree murder is punishable by not less than ten years but no more than life as indicated above.

[16] Count 5 did not apply to Petitioner.

[17] Certain section numbers of the statute have changed with 2012 amendments. However, substantively it remains the same.

Furthermore, the State dismissed Count 4 of the indictment, the using a firearm while engaging in a robbery resulting in death charge, thus removing the potential for another mandatory consecutive life sentence. Additionally, the State withdrew the Habitual Offender filing, thus removing an additional consecutive potential with a term of years to be non-parolable."[18]

This Court is thus satisfied that had Petitioner proceeded to trial, he ran the risk of receiving a longer sentence than was imposed. Furthermore, given Petitioner's initial statement to police, Ex. 15 O, the waiver of his *Miranda*[19] rights depicted therein, his admissions about his respective parts in the robbery event and the murder, his reaching out on his own to prison authorities for a free talk, and the totality of the evidence available to the prosecution, Petitioner had little chance of prevailing at trial if the State proceeded on a felony murder theory. Therefore, considering the standards set forth in *Hill* and *Neufville*, described above, Petitioner has failed to establish prejudice because of his counsel's alleged ineffective assistance.

IV

A Word on the Length of Time That the Instant Matter Has Been Pending

The Rhode Island Supreme Court has recently commented on what it considered unreasonable delay in certain cases. *See E. W. Burman, Inc. v. Bradford Dyeing Association, Inc*., 220 A.3d 745, 751 n.2 (R.I. 2019). ("The trial justice filed [the] written decision approximately six years after the parties filed their posttrial memoranda. We have not been apprised of an adequate explanation for the long and unreasonable delay in this case. Such a delay is not only concerning, but is also discouraged, as every effort should be made to decide cases as expeditiously and efficiently as possible."). *See also Souza v. Souza*, 221 A.3d 371, 373 n.3 (R.I. 2019). ("The

[18] The procedures are depicted in Exhibit 4 D and are discussed and specifically referenced herein.
[19] Miranda v. Arizona, 384 U.S. 436 (1966)

hearings in this case span over six years and across two counties, with a total of 45 hearing dates. Such a large number of hearing dates is discouraged. Custody and placement determinations such as those presented in this case should be decided as expeditiously and efficiently as possible. We have not been apprised of an adequate explanation for the unreasonable delay in this case.").

A review of the docket sheet indicates that while the instant application was filed on July 23, 2010, it was assigned to the instant justice on March 14, 2013. Thereafter, on May 14, 2013, Petitioner withdrew his application without prejudice. Thereafter, on November 9, 2015, Petitioner revived his application, and the Court appointed new counsel to represent Petitioner and thereafter met and conferred with counsel. From January 4, 2016 through present, the Court met and conferred on a generally monthly basis with counsel except during vacations, times when counsel were reached for other trials, December recesses, the pandemic period from March to September 2020, and during this Court's own recovery from surgery [November 2021 through March 2022]. The Court is aware of Petitioner's frustration at the delay in getting the case to a hearing. However, the Court was also aware that Petitioner's counsel was in diligent search of documents and transcripts that were represented to this Court to be integral to Petitioner's case. This Court had entered orders allowing *in forma pauperis* access to such evidence if it could be located. This Court is aware that Petitioner's counsel was diligently seeking access to such evidence. As the matter was pending, the Court was aware of certain difficulties encountered by Petitioner's counsel in locating and obtaining some of the transcripts and other documentary evidence described by counsel from his conversations with Petitioner. Two depositions were taken for use during the proceedings. Each had their own scheduling and logistical issues, including the scheduling of a deposition of a sitting United States District Court judge. During its monthly conferences with counsel, the Court continued to push to set a date for evidentiary hearing.

While this Court has consistently been ready to schedule an evidentiary hearing, the folly of proceeding to a hearing without any evidence is readily apparent. *See Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.3d 594, 602 (R.I. 2019) (affirming summary judgment against a plaintiff where the hearing justice found that plaintiff came forward with no evidence of any factual misrepresentation by defendant).

V

Conclusion

For the reasons stated herein, Petitioner's application for postconviction relief is denied. This Court shall enter an order and a separate judgment forthwith.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Wayman Turner v. State of Rhode Island**
CASE NO:	**PM-2010-4329**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 19, 2022**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**George J. West, Esq.**
For Defendant:	**Judy Davis, Esq.**